

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARCO PEREZ GARNICA,

Petitioner,

vs.

RON FRAKER,

Respondent.

NO. CV-11-008-JPH

**ORDER REJECTING REPORT AND
RECOMMENDATION IN PART, ADOPTING
REPORT AND RECOMMENDATION IN PART,
DENYING MOTION FOR EQUITABLE
TOLLING AND DISMISSING PETITION**

Before the Court, without oral argument, are a Report and Recommendation to deny Petitioner's Motion for Equitable Tolling, ECF No. 12, Petitioner's Objections titled "Motion to Object to Report and Recommendation . . .", ECF No. 20, and Petitioner's Response to the Order to Show Cause why the petition should not be dismissed as time-barred titled "Motion to Show Cause", ECF No. 21-9. Petitioner, a prisoner at the Clallam Bay Correction Center ("CBCC"), is proceeding *pro se* and *in forma pauperis*; Respondent has not been served.

Magistrate Judge Hutton recommended denying Petitioner's Motion for "equitable tolling" under 28 U.S.C. § 2244(d)(1)(B). Petitioner had conceded the limitations period began to run when his direct appeal became final. For AEDPA purposes, it began to run on December 5, 2007, ninety days after the Washington State Supreme Court denied review of his direct appeal on September 6, 2007. *See Summers v. Schriro*, 481

1 F.3d 710, 717 (9th Cir. 2007).

2 Throughout his objections, Petitioner repeatedly references his
3 "Motion to Show Cause," which the Court has construed as his Response to
4 the Order to Show Cause, ECF No. 21-9. Because Petitioner is proceeding
5 *pro se* and the issues regarding equitable tolling are intertwined with
6 his motion for equitable tolling and the directive to show cause, the
7 Court has considered his "Motion to Show Cause", ECF No. 21-9, in
8 conjunction with his objections, ECF No. 20.

9 **PETITIONER'S OBJECTIONS**

10 In his first objection, Petitioner asserts he "did claim denial of
11 the AEDPA and Habeas forms in previously submitted Habeas." He then
12 argues "(ITP [the Intensive Transitioning Program at the CBCC]) not
13 having AEDPA or Habeas material did entitle petitioner to equitable
14 tolling" In his third objection, Petitioner writes, "THE
15 MAGISTRATE JUDGE STATED[,] 'PETITIONER DOES NOT STATE WHEN HE WQAS [sic]
16 PLACED IN (IMU).'" He also objects to a statement suggesting his
17 placement in IMU was not a state-created impediment. Next, Petitioner
18 appears to object to the finding that he was able to file a direct
19 appeal, asserting this was only possible because he had been appointed
20 appellate counsel.

21 In his sixth objection, Petitioner asserts: (1) "The (IMU) was
22 inadequate and meaningless and void of AEDPA and habeas material to
23 access and properly and timely file with courts"; and (2) "contaract
24 [sic] attorneys were denied petitioner's requests to get AEDPA and
25 habeas materials which were out of petitioner's control and a state
26 creadted [sic] Impidimetn [sic]." Petitioner then objects to a finding
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1 that a box of "important legal work" was lost between December 28, 2007,
2 and March 25, 2008. He appears to object to the inference that the
3 alleged loss of this work did not make it impossible for him to file his
4 federal habeas petition within the limitations period. Petitioner
5 argues this is a misstatement of the facts, claiming he "could not
6 remember all the facts and issues because the destroyed legal work."

7 Petitioner asserts he "was able to file the habeas coprus [sic]
8 because [a Custody Unit Supervisor and a Correctional Officer] allowed
9 the law clerk to talk to petitioner due to inadequacy of (ITP)." It is
10 unclear when this conversation occurred. Petitioner avers, "without
11 this conversation with law clerk, petitioner would not have submitted
12 any habeas petition." He also states, "the law librarian just recemntly
13 [sic] made a copy of the AEDPA that also made it impoosible [sic] for
14 petitioner to file on time."

15 In his final objection, Petitioner asserts the Magistrate Judge
16 misinterpreted an affidavit from a law clerk which Petitioner had
17 previously submitted, ECF No. 7. Petitioner asserts this affidavit did
18 not mean he "attended the law library at the (ITP)." Rather, Petitioner
19 avers the law clerk "was alloed [sic] to talk to the petitioner due to
20 no AEDPA, habeas materials, no law librarian, and no law clerk or any
21 person trained in the law."

22 After review of the entire record and being fully advised, **IT IS**
23 **HEREBY ORDERED:** the statement in the Report and Recommendation, ECF No.
24 12, at page 6, suggesting Petitioner *attended* the law library in the
25 unit housing the Intensive Transitioning Program between December 11,
26 2009, and July 15, 2010, is **REJECTED as erroneous.** Nevertheless, the
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1 Court finds Petitioner has failed to demonstrate extraordinary
2 circumstances, beyond his control, which made it impossible for him to
3 file his federal habeas petition in a timely manner. Accordingly, **IT IS**
4 **HEREBY ORDERED:** the remainder of the Report and Recommendation is
5 **ADOPTED** and the Motion for Equitable Tolling, ECF No. 4, is **DENIED**. For
6 the following reasons, **IT IS HEREBY ORDERED**" the petition is **DISMISSED**
7 **as untimely** under 28 U.S.C. § 2244(d).

8 **EQUITABLE TOLLING**

9 Equitable tolling determinations are "highly fact-dependent."
10 *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir.2000) (en banc) (per
11 curiam). In *Whalem/Hunt*, the state's failure to provide access to the
12 text of the AEDPA constituted possible grounds for equitable tolling
13 because, according to the petitioner's allegations, the absence of a
14 copy of the AEDPA prevented him from learning about the AEDPA's one-year
15 deadline and therefore prevented a timely filing. See 233 F.3d at 1149
16 (Tashima, J., concurring).

17 It is unclear from Petitioner's submissions when he became aware of
18 the AEDPA deadline. In his Motion Requesting to Proceed Under Equitable
19 Tolling, Petitioner stated he believed that the deadline for filing his
20 federal habeas petition was June 14, 2010. ECF No. 4, pg. 2. In
21 reviewing Petitioner's objections to the Report and Recommendation that
22 he be denied equitable tolling, the Court finds his statement, "(ITP) .
23 . . does not have meaningful access to the courts to file a habeas
24 corpus," is a legal conclusion, rather than a factual allegation.
25 Furthermore, alleging a lack of "habeas corpus materials" and asserting
26 that law books are "old" and "obsolete," is not the same as stating
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1 there was **NO** access to the AEDPA or habeas forms.

2 Petitioner asserts in his "Motion to Show Cause", ECF No. 21-9,
3 that the law librarian only recently copied "20 pages out of 126" of
4 AEDPA material. *Id.* pg. 3. This assertion, however, does not show
5 Petitioner was denied access to the text of the AEDPA, particularly 28
6 U.S.C. § 2244, during the time period in which he was required to file
7 his federal habeas petition.

8 Furthermore, the fact a law library clerk and an attorney provided
9 Petitioner erroneous information regarding how to calculate his deadline
10 for filing a habeas petition is not a basis for equitably tolling the
11 limitations period. *See Miranda v. Castro*, 292 F.3d 1063, 1067-1068
12 (9th Cir. 2002) (holding that an attorney's miscalculation of the
13 deadline for filing a federal habeas petition does not justify equitable
14 tolling of the limitation period); *Frye v. Hickman*, 273 F.3d 1144, 1146
15 (9th Cir. 2001) ("We can conclude that miscalculation of the limitations
16 period by [petitioner's] counsel and his negligence in general do not
17 constitute extraordinary circumstances sufficient to warrant equitable
18 tolling.").

19 **LIMITATION PERIOD**

20 As stated above, Petitioner's direct appeal concluded on December
21 5, 2007, ninety days after the Washington State Supreme Court denied
22 review on September 6, 2007, ECF No. 1-4, page 72. *See Summers*, 481
23 F.3d at 717. According to Petitioner's declaration (Exhibit A) attached
24 to his "Motion to Show Cause", ECF No. 21, he was housed in the
25 Intensive Management Unit ("IMU") of the Washington Corrections Center
26 ("WCC") at that time, allegedly because he had been assaulted.

1 On December 18, 2007, he was transferred to the Monroe Correctional
2 Complex ("MCC"), and then placed in the IMU on December 19, 2007, after
3 he was "involved in an altercation with two other inmates." ECF No. 21,
4 Exhibit A. Petitioner remained there until his transfer back to the WCC
5 on September 22, 2008.

6 The Court notes, during his confinement at the MCC/IMU,
7 Petitioner filed his Personal Restraint Petition in state court on
8 August 1, 2008. Because Petitioner was able to file a Personal
9 Restraint Petition, he is not entitled to relief under 28 U.S.C. §
10 2244(d)(1)(B). See *Ramirez v. Yates*, 571 F.3d 993, 1000-1001 (9th
11 Cir.2009) (relief under 28 U.S.C. § 2244(d)(1)(B) available only if
12 impediment prevented any filing in any court). At the time he filed
13 his Personal Restraint Petition, 239 days of the AEDPA limitations
14 period had already expired. Petitioner makes no complaints regarding
15 the adequacy of the law library at the MCC/IMU, or the availability of
16 the AEDPA or habeas forms at that facility.

17 On March 30, 2010, the Washington State Supreme Court denied
18 Petitioner relief on his Personal Restraint Petition. ECF No. 1-4, pg
19 73. See *Wixom v. Washington*, 264 F.3d 894, 897-98 (9th Cir. 2001)("[I]t
20 is the decision of the state appellate court, rather than the
21 ministerial act of entry of the mandate, that signals the conclusion of
22 review.") At that time, 126 days of the limitations period under 28
23 U.S.C. § 2244(d) remained. Therefore, Petitioner had until August 3,
24 2010, to file a federal habeas petition. His January 3, 2011 petition
25 was five months late.

26 According to the affidavit of a law library clerk, ECF No. 7, pg.

1 1, Petitioner was attending the "Intensive Transitioning Program"
2 between December 11, 2009, and July 15, 2010. He had claimed "while
3 trying to meet his deadline in IMU & ITP - he filed requests &
4 grievances regarding the lack of meaningful access to the courts." ECF
5 No. 4, pg. 3. He believed that deadline to be June 14, 2010. *Id.* pg.
6 2.

7 REQUESTS AND GRIEVANCES

8 The Court has reviewed Petitioner's "Exhibit B" attached to his
9 Petition, ECF No. 1, pgs. 49-70. He has presented only one "grievance,"
10 dated August 10, 2010. *Id.* pg. 60. This was almost two months after
11 Petitioner believed he had to file his federal habeas petition, and a
12 week after his actual deadline for doing so. In this grievance,
13 Petitioner stated he had received an attorney visit on January 19, 2010,
14 and the attorney said he would send "Information pertaining to Habeas
15 Corpus to help/assist me in my legal preparation." Although Petitioner
16 indicated he also sent a "request" on April 11, 2010, he did not provide
17 a copy of this document or state its content. Contrary to Petitioner's
18 assertion, submitting a grievance after the expiration of a deadline
19 does not demonstrate the exercise of due diligence.

20 Petitioner also provided a copy of a "kite" he submitted on June
21 29, 2010, stating he was "having trouble with contract attorneys . . ."
22 ECF No. 1, pg. 66. This was more than two weeks after Petitioner
23 believed the limitations period for filing a habeas petition had
24 expired, and he does not mention any failure to provide a habeas
25 petition form or the relevant text of the AEDPA in the kite.

26 Based on his assertions, Petitioner waited almost three months,
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1 from January to April 2010, to follow up on his "request" of an attorney
2 for "Information pertaining to Habeas Corpus to help/assist [him] in
3 [his] legal preparation." ECF No. 1, pg. 60. Notations appearing on a
4 letter dated January 5, 2010, indicated "habeas papers" was only one of
5 many of Petitioner's requests for legal information, ranging from
6 divorce to "INS to Mexico." ECF No. 1, pg. 59.

7 While equitable tolling is applicable in an appropriate case,
8 *Holland v. Florida*, 560 U.S. ___, 130 S.Ct. 2549 (2010), Petitioner has
9 not presented such a case. To the extent Petitioner asserts contract
10 attorneys created an "impediment" and "extraordinary circumstances" that
11 kept him from filing a timely habeas petition, he presents no facts
12 showing these attorneys were retained by him to file a habeas petition.
13 In any event, attorney negligence such as missing a filing deadline does
14 not warrant equitable tolling. *Lawrence v. Florida*, 549 U.S. 327, 336
15 (2007).

16 Petitioner has failed to demonstrate diligence in the preparation
17 of a federal habeas petition prior to the expiration of the limitations
18 period. Indeed, Petitioner's assertion in his Objections that, but for
19 a conversation he had with a law clerk on an unspecified date, he would
20 not have submitted any habeas petition, does not demonstrate an exercise
21 of due diligence warranting equitable tolling.

22 **LOSS OF LEGAL FILES**

23 Petitioner also asks the Court to consider the fact a box
24 containing his legal file was destroyed by CBCC. Petitioner asserts in
25 his declaration, ECF No. 21, Ex. D, that he was notified of a box of
26 property at the CBCC on December 28, 2007. He indicates he attempted to
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1 have it sent to him on January 20, 2008, but apparently did not have
2 sufficient funds. He made a second attempt on January 28, 2009, and
3 sought "an extension on box" on February 15, 2008. *Id.* Petitioner
4 states he received a letter that his box was destroyed on November 5,
5 2008. Petitioner does not state what steps he took to secure the box
6 between February and November 2008.

7 Petitioner asserts he also learned on April 9, 2008, that a legal
8 file in another property box had been mixed up with the property of a
9 former cell mate, and was sent with that person to "ICE for
10 deportation." ECF No. 21, Ex. E. Regardless, the Court notes once
11 again that Petitioner filed a Personal Restraint Petition in state court
12 on August 1, 2008. Therefore, any loss of legal work in 2008 would not
13 have prevented Petitioner from meeting a deadline to file a federal
14 habeas petition two years later.

15 Petitioner asserts "more pages of [his] legal file" were destroyed
16 when the sprinkler system at the WSP was accidentally turned on in January
17 2009. ECF No. 21, Ex. F. Again, Petitioner presents no facts showing
18 the loss of his legal work in January 2009, actually prevented him from
19 timely filing his federal habeas petition in August 2010.

20 TRANSFERS

21 Petitioner lists numerous transfers in his declaration. ECF No.
22 21, Ex. A. He indicates his placement in the IMU at various facilities
23 was due to him either perpetrating an assault on others, or being
24 assaulted. While housed at the Washington State Penitentiary ("WSP")
25 on November 20, 2008, he states he requested to return to the IMU "to
26 severe [sic] ties with all involvements with the prison system stg
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1 groups." The court assumes "stg" means "Security Threat Group." Based
2 on these "involvements," Petitioner's assertion of a "state imposed
3 pediment" is not well taken.

4 Petitioner indicates he was transferred to the WCC on February 18,
5 2009, and then to the Clallam Bay Correction Center ("CBCC") on February
6 24, 2009. He states he was released from the CBCC/IMU on March 5, 2009,
7 and assaulted on March 6, 2009, requiring stitches. He does not clearly
8 state whether he was again placed in the CBCC/IMU following the assault
9 on March 6, 2009, and if so, for how long. Although Petitioner indicates
10 he was interviewed for the Intensive Transitioning Program, he does not
11 state when this occurred. We know from prior submissions that
12 Petitioner participated in the Intensive Transitioning Program between
13 December 11, 2009, and July 15, 2010. ECF No. 7, pg. 1.

14 Once again, Petitioner was able to file his Personal Restraint
15 Petition on August 1, 2008, while housed in the MCC/IMU between December
16 19, 2007, and September 22, 2008. Taken as a whole, Petitioner's
17 assertions have failed to demonstrate either that these alleged
18 impediments made it impossible for him to file a timely federal habeas
19 petition, or that he diligently pursued his rights. *See Hughes v. Idaho*
20 *State Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986); *Pace v.*
21 *DiGuglielmo*, 544 U.S. 408, 418, (2005). Accordingly, **IT IS HEREBY**
22 **ORDERED:** the Petition is **DISMISSED with prejudice** as untimely under 28
23 U.S.C. § 2244(d).

24 **IT IS SO ORDERED.** The District Court Executive is directed to
25 enter this Order, enter judgment, and forward a copy to Petitioner. The
26 Court further certifies that pursuant to 28 U.S.C. § 1915(a)(3), an
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1 appeal from this decision could not be taken in good faith, and there is
2 no basis upon which to issue a certificate of appealability. 28 U.S.C.
3 § 2253(c); Fed. R.App. P. 22(b).

4 **DATED** this 27th day of May 2011.

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7 S/ Edward F. Shea
8 EDWARD F. SHEA
9 UNITED STATES DISTRICT JUDGE

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